***Fraport v Philippines* (Germany-Philippines BIT) (case pending; summary as of February 2011)**

AREAS OF POLICY AFFECTED: transportation (airports), privatization (airport), public contracting (airport construction and operation), administration of justice (court decisions).

CASE SUMMARY: The case arises from the failed privatization of an international airport terminal in Manila, Philippines. In the 1990s, foreign investors were given a 25-year concession to build and operate the terminal. There were allegations of corruption associated with the concession. After problems arose with the investment, only the German company Fraport was willing to continue to invest funds. Further problems arose from the liberalization, cost-cutting, and re-structuring of the Philippines airline PAL (in connection with a structural adjustment program). A requirement in the concession agreement that PAL fly from the Fraport-operated terminal would likely have destroyed the airline financially, but Fraport refused to renegotiate the relevant terms of the privatization contract. Eventually the concession was declared void by the Arroyo government. By this point, the terminal was almost complete. Fraport requested arbitration, while the government expropriated the terminal with a commitment to pay just compensation under domestic law.

Fraport was initially unsuccessful in its claim under the Germany-Philippines bilateral investment treaty (BIT). However, the award was annulled in December 2010 by an ICSID panel. Thus, the ICSID arbitration is pending. Fraport was also unsuccessful in a commercial arbitration at the International Chamber of Commerce under the concession agreement, although the Philippines' counter-claims were also denied.

COMMENT: This is an example of a longstanding claim with roots in a historical concession, agreed by an allegedly corrupt government. It raises the question of whether and how a new government can revisit decisions of an earlier government.

The Philippines press has reported that the government has spent over (U.S.) $45 million to date on legal and arbitration fees for the two arbitrations launched by Fraport. This is probably the largest amount reported in investment arbitration, although other cases have cost governments close to (U.S.) $20 million. The amount spent by the Philippines raises concerns about regulatory chill arising from the costs of defending a claim, regardless of the strength of a government's case. In most investment treaty cases, the tribunal has not ordered the claimant to pay the legal and arbitration costs of the successful respondent state.

Source: www.iiapp.org (February 2011), based on information in publicly-available awards and materials in known investment arbitrations (for texts of awards, see www.italaw.com). This report was produced by a research team coordinated by professor Gus Van Harten (gvanharten@osgoode.yorku.ca) of Osgoode Hall Law School of York University in Toronto, Canada. Please see the disclaimer and statement on terms of use available at www.iiapp.org.